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No. 900

In the Supreme Court of the United States

OCTOBER TERM, 1959

CONSTANTINE GUINESS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-8a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 3, 1960. The petition for a writ of certiorari was filed on May 2, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims should have dismissed petitioner's suit for back pay, addressed solely

to the merits of his discharge from federal employment, on the ground that the courts will review only assertions of procedural irregularity.

2. Whether, in any event, the Court of Claims properly dismissed petitioner's claim since there was substantial evidence in the administrative record to support his discharge from the Military Sea Transportation Service for cause on the ground of desertion.

STATUTE AND REGULATION

The pertinent part of 46 U.S.C. 701 and the applicable portion of the governing regulation, Civilian Marine Personnel Instruction No. 45, Sections 6-1 and 6-2 are set forth at pp. 2-3 of the petition.

STATEMENT

Petitioner, a veteran preference eligible, was employed by the Military Sea Transportation Service, Department of the Navy, as First Assistant Engineer on the USNS SHORT SPLICE (Pet. App. 2a). On February 3, 1956, he received written notice proposing his removal from the Service on the ground that on January 20, 1956, he had deserted his ship at the United States Naval Station, Bermuda. He was further advised that if the charge of desertion was sustained, he would forfeit all accumulated pay and allowances, annual leave, and any possessions left aboard the ship[1] (Defendant's Exhibit 2). Petitioner was given thirty days to answer the charge and the

[1] 46 U.S.C. 701 (Pet. 2), establishing, *inter alia*, the penalty of forfeiture for deserting seamen, is followed by provisions establishing the procedure of implementing the penal-

opportunity for an administrative hearing. After such a hearing was held on February 14, 1956, and on May 23, 1956, MSTS advised petitioner of its determination that he had deserted the ship and that he be removed from service for that reason, effective May 31, 1956 (Defendant's Exhibits 4, 5, 6, 27J, 27L).

The circumstances surrounding petitioner's departure from the vessel are set forth in the agency's findings (Defendant's Exhibit 27J) and in those of the court below on its independent review (Pet. App. 1a-6a). The departure stemmed from an altercation with a subordinate which took place in the Chief Petty Officers' Club at the Bermuda Naval Station (Pet. App. 2a). Petitioner followed the subordinate back to the vessel, attempted to resume the altercation, but was restrained by other officers and members of the crew (Pet. App. 2a). Both at the Club and in the melee aboard the vessel, petitioner was

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ty. 46 U.S.C. 702, *et seq.* Title 46, however, in terms, governs only "merchant seamen," and its provisions and procedures are not applicable to seamen employed by the Government. See, *e.g.*, *United States* v. *Sullivan*, 43 Fed. 602 (C.C. Ore.). The rule of forfeiture embodied in 46 U.S.C. 701 has been applied nonetheless by the Military Sea Transportation Service to Government seamen who desert, in view of 5 U.S.C. 1082(8), providing that the compensation of such seamen "shall be fixed * * * in accordance with prevailing rates and practices in the maritime industry." Thus, Civilian Marine Personnel Instruction No. 45 provides for the penalty of forfeiture for deserting Government seamen, in addition to removal from federal employment, and for the mode of withholding payment of wages, allowances, and leave.

struck by the subordinate several times (Pet. App. 2a).

Petitioner then determined to leave the vessel despite the advice of his friend, the Chief Mate, who cautioned against such action (Pet. App. 3a). After hours of discussion with the Chief Mate, petitioner borrowed a suitcase from him, packed most of his gear and left the vessel, proceeding to a nearby hotel (Pet. App. 3a). Upon obtaining a room, petitioner called the Chief Engineer of the SHORT SPLICE to inform him of certain necessary preparations for the vessel's sailing on the next morning. The Chief Engineer urged him "over and over again" to return to the ship, prior to its departure the next morning for Norfolk, but petitioner steadfastly refused, stating that he had already made a reservation on a flight back to New York (Pet. App. 4a). The vessel sailed the next morning, and petitioner subsequently took a plane to New York where he reported to MSTS headquarters (Pet. App. 4a).

On June 6, 1956, petitioner appealed from the MSTS decision to the Second United States Civil Service Region of the Civil Service Commission. Another hearing was held before the Commission and, based on its view of the evidence adduced at that hearing, the Commission, on September 12, 1956, rendered its decision that the agency had complied with all procedural requirements in petitioner's removal and that the determination of desertion was sustained by a preponderance of the evidence (Defendant's Exhibit 1). In this decision, the Commission carefully delineated the evidence and concluded

that petitioner had deliberately left the vessel, aware of the consequences of his action, and with the intention not to return. It found further that the evidence did not establish that petitioner was subjected to cruel treatment on the vessel, nor that he was in fear of his personal safety. Finally, it found that, "in the light of all the evidence," the fact that he had left certain personal items aboard the ship was "insufficient to defeat the charge of desertion" (Defendant's Exhibit 1).

On September 20, 1956, petitioner prosecuted an appeal from this decision to the Board of Appeals and Review of the Civil Service Commission (Defendant's Exhibits 24, 25). On January 18, 1957, the Board notified petitioner that it had affirmed the decision of the Regional Office on the ground that the charge of desertion was fully substantiated by the evidence (Defendant's Exhibit 26).

On September 30, 1958, petitioner brought suit for back pay in the Court of Claims (R. 1-4), alleging that the actions of MSTS and of the Civil Service Commission were arbitrary and capricious in that there was no substantial evidence in the administrative record to sustain the charge of desertion (R. 4; Pet. App. 2a). Petitioner made no complaint of procedural irregularity in the administrative action. On cross-motions for summary judgment, the Court of Claims undertook a thorough review of the evidence in the administrative record, including petitioner's purported excuses for his action (Pet. App. 1a-6a), and found that the Commission's determination of desertion was entirely reasonable and sup-

ported by substantial evidence (Pet. App. 6a). Accordingly, it granted the Government's motion for summary judgment (Pet. App. 6a).

ARGUMENT

Petitioner presents no question justifying review by this Court. As in his action in the Court of Claims, he makes no claim whatever of any procedural irregularity in the effectuation of his removal by MSTS. This being so, the Court of Claims should have dismissed his action without review of the evidence in the administrative record underlying the reason for removal. In any case, the decision reached by the court below on that review—that there is substantial evidence to support the administrative action—is clearly correct.

1. Petitioner's sole complaint here, as in the court below, is that the administrative determination of removal for desertion is not supported by substantial evidence. He asserts no ground of administrative procedural irregularity, nor could he, since he was afforded all the rights and protections accorded to an employee in his status. His attack, rather, goes to the merits of the basis for his removal, and, as such, is beyond the scope of judicial review. It is firmly established that the courts will review only alleged procedural irregularities in discharges from federal employment and will not look to the merits of such discharges. *E.g.*, *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290; *Keyton* v. *Anderson*, 229 F. 2d 519 (C.A. D.C.); *Carter* v. *Forrestal*, 175 F. 2d 364 (C.A. D.C.), cer-

tiori denied, 338 U.S. 832. Hence, the Court of Claims should have dismissed petitioner's action without reviewing the evidence underlying the reason for agency removal.

2. In any event, petitioner was accorded a complete review in the court below of his claim that the administrative determination of desertion is unsupported by substantial evidence. This claim is advanced by petitioner here, as in the court below, by unjustified reliance solely on his version of the events surrounding his departure from the SHORT SPLICE as it appears in his testimony and statements in the administrative record. Upon examination of the complete record, however, including the testimony and statements of the other witnesses to the events involved, the Court of Claims correctly concluded that there was ample evidence to sustain the finding of desertion and that the administrative determination was entirely reasonable. In reaching this conclusion, moreover, the Court of Claims carefully considered and properly disposed of each of the factors listed under Civilian Marine Personnel Instruction No. 45, which are raised by petitioner here as purportedly rebutting his intent to desert.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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